LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
FEB 28 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 910

EARL SPIGNER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

THOMAS C. LYNCH, Attorney General
of the State of California

DORIS H. MAIER
Assistant Attorney General

EDWARD H. HINZ, JR.
Deputy Attorney General

DANIEL J. KREMER
Deputy Attorney General
500 Wells Fargo Bank Building
Fifth and Capitol Mall
Sacramento, California 95814
Attorneys for Respondent

printed in CALIFORNIA OFFICE OF STATE PRINTING

TOPICAL INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	3
History of the Case	3
Factual Statement	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. PETITIONER HAS NOT BEEN DENIED HIS CONSTITUTIONALLY GUARANTEED RIGHT TO CONFRONT THE WITNESSES AGAINST HIM	7
A. The Record As A Whole Demonstrates That Petitioner's Counsel Stipulated To The Submission Of The Case Upon The Transcript Of The Preliminary Hearing And That Petitioner Acquiesced In That Stipulation	7
B. Defense Counsel's Tactical Decision To Stipulate To The Submission Of The Cause Upon The Transcript Of The Preliminary Hearing, With The Reservation That He Might Produce Additional Witnesses Is Binding Upon Petitioner	9
C. Petitioner's Right To Confront The Witnesses Against Him Was Not Denied Him	17
CONCLUSION	19

TABLE OF AUTHORITIES CITED

CASES

Page

Barber v. *Page*, 381 F. 2d 479, 481 (10th Cir. 1967)---16, 18

Brookhart v. *Janis* (1966) 384 U.S. 1---16

Butler v. *Wilson*, 365 F. 2d 308, 310 (9th Cir. 1966)---16, 18

Fay v. *Noia* (1963) 372 U.S. 391---10

Henry v. *Mississippi* (1965) 379 U.S. 443---11

In re Smiley (1967) 66 A.C. 634, 58 Cal. Rptr. 579, 427 P. 2d 179---7, 8

People v. *Davis*, 48 Cal. 2d 241, 309 P. 2d 1---16

People v. *Foster* (1967) 67 A.C. 614, 63 Cal. Rptr. 288, 432 P. 2d 976---17

People v. *Johnson* (1965) 62 Cal. 2d 325, 331, 42 Cal. Rptr. 228, 398 P. 2d 420---8

Pointer v. *Texas* (1965) 380 U.S. 400---17, 18

Powell v. *Alabama* (1932) 287 U.S. 45---12

Symons v. *Klinger*, 372 F. 2d 47, 49 (9th Cir. 1967)---16, 18

Whitus v. *Balkcom*, 333 F. 2d 496 (5th Cir. 1964)---11, 13

Wilson v. *Gray* (9th Cir. 1965) 345 F. 2d 282---11, 12, 14, 15, 16

CODES

28 U.S.C. 1257(3)---2

Penal Code § 182---2, 3, 21

§ 459---2, 3, 22

§ 496---2, 3, 23

CONSTITUTIONS

Sixth Amendment, United States Constitution---2, 6, 7, 17, 18

Fourteenth Amendment, United States Constitution---2, 7, 15, 17

RULES

Rule 22, Revised Rules of the Supreme Court of the United States---2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 910

EARL SPIGNER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeal of the State of California, in and for the Second Appellate District, Division Two, was filed on June 27, 1967, and is unreported. A copy of the opinion is attached to petitioner's brief as Appendix "A". The California Supreme Court denied a hearing on September 21, 1967. A copy of that order is attached to petitioner's brief as Appendix "B".

JURISDICTION

Since the instant petition for write of certiorari was filed on December 13, 1967, and since the order of the Supreme Court of the State of California denying a hearing was entered on September 21, 1967, the jurisdiction of this Court is timely invoked under 28 U.S.C. 1257(3), and Rule 22 of the Revised Rules of the Supreme Court of the United States.

QUESTION PRESENTED

Was petitioner denied the right to confrontation guaranteed him by the Sixth and Fourteenth Amendments when the record, as a whole, shows that petitioner's counsel, with appropriate reservations, agreed to the submission of the cause upon the transcript of the preliminary hearing; that petitioner was aware of this and similar stipulations and offered no objection to them; that sound tactical reasons existed for entering into the stipulation to submit; and that petitioner, while represented by counsel and with full opportunity to cross-examine, did confront the witnesses in question at the preliminary hearing?

STATUTES INVOLVED

The relevant statutes are printed in the Appendix: They are:

California Penal Code section 182
California Penal Code section 459
California Penal Code section 496

STATEMENT

History of the Case

On July 30, 1965, the District Attorney of Los Angeles County filed an information in the superior court for that county charging petitioner with violation of California Penal Code section 459, burglary (CT 118). On August 23, 1965, petitioner, represented by the public defender, pleaded not guilty to the charge set forth in the information (CT 127).[1]

On December 1, 1965, an amended information was filed charging petitioner with violation of California Penal Code section 459, burglary and violation of California Penal Code section 496, receiving stolen property (CT 119–120).

On December 6, 1965, a second amended information was filed charging petitioner with violation of California Penal Code section 182, conspiracy, and repeating the aforesaid allegations of burglary and receiving stolen property (CT 121–124). That same day, petitioner, represented by counsel, was arraigned upon this information and pleaded not guilty to the charges set forth (CT 131).

On March 22, 1966, petitioner, both personally and through counsel, waived jury trial (CT 134; RT 2).[2]

---

[1] CT refers to the Clerk's Transcript of the proceedings in the superior court below, which includes a transcript of the testimony taken at the preliminary hearing. Respondent's copy of said Clerk's Transcript is lodged with this Court.

[2] RT refers to the Reporter's Transcript of the proceedings in the superior court below, respondent's copy of which is lodged with this Court.

Through counsel, it was stipulated that the cause be submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to the court's rulings, with each side reserving the right to offer additional evidence (CT 134).

The cause came on for trial on April 21, 1966 (CT 136). In petitioner's presence, and without any objection from him, both counsel stipulated to the substance of the testimony of eleven witnesses (RT 4–13). Thereafter, additional testimony was taken on behalf of both petitioner and the People. Following argument, the court found petitioner guilty of conspiracy and burglary in the second degree (RT 68–69). A probation report was ordered and the matter was continued (CT 136).

On May 20, 1966, petitioner's motion for new trial was heard and denied. Probation was denied and petitioner was sentenced to the California State Prison for the term prescribed by law on both counts, the court staying execution of the sentence for conspiracy pending a final disposition on appeal (RT 77, CT 189). The court further ordered that petitioner's sentence should run concurrently with an outstanding federal term. (CT 189).

Notice of appeal was filed on May 20, 1966 (CT 140) and on June 27, 1967, the trial court's judgment was affirmed by opinion of the Court of Appeal of the State of California in and for the Second Appellate District (Petitioner's Appendix "A"). The

California Supreme Court denied a hearing on September 21, 1967 (Petitioner's Appendix "B").

The instant petition for writ of certiorari was filed on December 13, 1967.

Factual Statement

The facts of the crime are set out in the opinion of the Appellate Court below which petitioner has attached to his application for writ of certiorari as Appendix "A". The following facts regarding the submission upon the transcript of the preliminary examination are pertinent to the issue presented here.

> The Clerk's Transcript for March 22, 1966, states: "By stipulation of all counsel the cause is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this Court's rulings, with each side reserving the right to offer additional evidence, and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings." (CT 134.)

The Reporter's Transcript for that day does not include this stipulation, however, when the cause came to trial on April 21, 1966, the following colloquy was had between the court and defense counsel in petitioner's presence:

> "THE COURT: The record will show that I have received the Preliminary Transcript, which I have read and considered in accordance with our previous stipulation. Mr. Lenoir, did you want me to return your copy at this time or do you need it?

"MR. LENOIR: I do not particularly need it.
"THE COURT: If you do, just let me know . . . ." (RT 4.)

Petitioner's counsel immediately thereafter entered into stipulations with the prosecuting attorney as to the substance of the testimony of eleven witnesses (RT 4–13). The record shows no objection by petitioner.

SUMMARY OF ARGUMENT

Read as a whole, the record demonstrates that petitioner's trial counsel did enter into the stipulation to submit recited in the Clerk Transcript and that petitioner, fully aware of this decision, offered no objection to it.

A capacity to effect binding tactical decisions on behalf of his client is implicit in counsel's role as the manager of the lawsuit. Counsel's determination to submit herein was one such tactical decision and is supported by sound strategic considerations. It therefore binds petitioner.

In any event, the record demonstrates that petitioner was afforded full right to confront and cross-examine the witnesses against him at the preliminary hearing. The Sixth Amendment does not require that that confrontation be repeated each time that testimony is received into evidence.

ARGUMENT

I. Petitioner has not been denied his constitutionally guaranteed right to confront the witnesses against him

Petitioner's assertion that he has been denied the right to confrontation assured him by the Sixth and Fourteenth Amendments to the Constitution rests upon three grounds, the establishment of each of which is necessary to petitioner's cause; first, that aside from a printed recital in the Clerk's Transcript, the record does not show that either the petitioner or his counsel stipulated to the submission of the case on the transcript of the preliminary hearing; second, that even assuming such a stipulation on counsel's part, such a stipulation cannot bind petitioner unless the record demonstrates that he personally and intelligently associated himself with the stipulation; and third (a proposition which petitioner assumes, but never argues), that petitioner did not in fact confront the witnesses against him.

Respondent respectfully submits that none of these propositions will bear the weight assigned it.

A. THE RECORD AS A WHOLE DEMONSTRATES THAT PETITIONER'S COUNSEL STIPULATED TO THE SUBMISSION OF THE CASE UPON THE TRANSCRIPT OF THE PRELIMINARY HEARING AND THAT PETITIONER ACQUIESCED IN THAT STIPULATION

Petitioner here relies upon *In re Smiley* (1967) 66 A.C. 634, 58 Cal.Rptr. 579, 427 P.2d 179, for the proposition that since the stipulation was part of a printed form, it is insufficient to show that the stipulation actually occurred. *Smiley* is a right to counsel case. There the docket entry simply stated that peti-

tioner had been "duly arraigned" (*In re Smiley, supra,* at 643). The question then became whether the phrase "duly arraigned" imported full admonition and waiver of the petitioner's right to counsel. The difficulty with petitioner's reliance upon *Smiley* is that the entry in the Clerk's Transcript here is not a cryptic phrase, but a full exposition of the event and that, again, unlike *Smiley,* the subsequent record is not silent upon the issue. The task, as the California Supreme Court has indicated, is to "look at the entire record to ascertain the meaning of the entry." (*People* v. *Johnson* (1965) 62 Cal. 2d 325, 331, 42 Cal.Rptr. 228; 398 P.2d 420.)

Here, the Reporter's Transcript for April 21, 1966, contains the following illuminating colloquy between the court and defense counsel in petitioner's presence:

> "THE COURT: The record will show that I have received the Preliminary Transcript, which I have read and considered in accordance with our previous stipulation. Mr. Lenoir, did you want me to return your copy at this time or do you need it?
>
> "MR. LENOIR: I do not particularly need it.
>
> "THE COURT: If you do, just let me know . . . ." (RT 4.)

Thus, the record, far from being silent, demonstrates that the stipulation set out in the Clerk's Transcript did occur; that petitioner's counsel furnished the court with his own copy of the transcript and that petitioner, personally present, raised no objection either to this stipulation or the immediately

subsequent stipulations as to the substance of the testimony of eleven witnesses (RT 4–13).

Further, the stipulation in question was wholly consistent with petitioner's defense which was to admit those facts which the People could easily prove (the occurrence of the burglaries, petitioner's renting a truck subsequently used to transport stolen goods and petitioner's giving a false name on being arrested) to attack the evident weakness in the People's case (that petitioner could not be identified as the driver of the truck) and to present an alibi for the critical periods (RT 17–18) coupled with an attempt to explain the renting of the truck and giving a false name on arrest (RT 31–32, 29–30).

Respondent therefore submits that a reading of the stipulation set out in the Clerk's Transcript in light of the exchange at RT 4, the evident defense strategy, and petitioner's failure to record an objection amply demonstrates that the asserted stipulation did occur, that the petitioner knew of it and acquiesced in it.

B. DEFENSE COUNSEL'S TACTICAL DECISION TO STIPULATE TO THE SUBMISSION OF THE CAUSE UPON THE TRANSCRIPT OF THE PRELIMINARY HEARING, WITH THE RESERVATION THAT HE MIGHT PRODUCE ADDITIONAL WITNESSES IS BINDING UPON PETITIONER

Petitioner's second line of attack is the assertion that in any event, a defense counsel's stipulation which amounts to a waiver of any of a defendant's constitutional rights is not valid unless that defendant personally, expressly and intelligently agrees to the stipulation. Such is not the case under either California or federal law.

In *Fay* v. *Noia* (1963) 372 U.S. 391, this Court set out the familiar requisites for the waiver of a constitutional right at page 439:

> "[T]he classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. Cf. *Price* v. *Johnston*, 334 U.S. 266, 291. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. Cf. *Carnley* v. *Cochran*, 369 U. S. 506, 513–517; *Moore* v. *Michigan*, 355 U. S. 155, 162–165. *A choice made by counsel not participated in by the petitioner does not automatically bar relief.*" (Emphasis added.)

As the Ninth Circuit has noted:

> "Implicit in this statement is the notion that in the proper circumstances counsel for the accused may effectively waive certain rights of the accused

during the course of his representation of the accused and as a matter of trial strategy or tactics." (*Wilson* v. *Gray* (9th Cir. 1965) 345 F.2 282, 288–289, Cert. Den. 382 U. S. 919.)

Any doubts that this proposition applied to the waiver of a defendant's constitutional rights were dispelled by *Henry* v. *Mississippi* (1965) 379 U. S. 443. That case involved defense counsel's failure to object to the introduction of illegally seized evidence. There, this Court stated at pages 451–452:

> "[I]f either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus* v. *Balkcom*, 333 F.2d 496 (C. A. 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case."

That such must of necessity be the rule absent exceptional circumstances follows from the very nature of the right to counsel and the need for that right.

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right

> to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." (*Powell* v. *Alabama* (1932) 287 U.S. 45, 68-69.)

If counsel's role is to guide, he must be free to do so and his decisions must be binding upon the one whom he leads. As the Ninth Circuit observed in commenting upon the *Powell* case and those following it:

> " 'We are in hearty agreement with these views. And we think that it inevitably flows from them that when a defendant has counsel * * * it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is the essence of the adversary system of which we are so proud. In the nature of things he must be, because he knows how to do the job and the defendant does not. That is why counsel must be there.' " (*Wilson* v. *Gray*, 345 F.2d 282 (9th Cir. 1965), p. 290, Cert. Den. 382 U. S. 919.)

The issue is thus resolved into two questions: is the situation here the exceptional one, and was counsel's decision and stipulation to forego additional cross-examination of the witnesses who had appeared at the preliminary hearing motivated by tactical considerations consistent with petitioner's theory of defense

at trial? The answer to the first question is plainly no—exceptional circumstances are neither asserted by petitioner nor do they appear from the record (compare *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964)). As plainly, the answer to the second is that prudent tactical considerations motivated counsel's action.

As stated previously, the strategy adopted by petitioner's counsel was to admit or at least not to challenge what the People could easily and definitely prove—the burglary, petitioner's rental of a truck, that truck's use in the burglaries, and the giving of a false name on arrest, and then to attempt to explain away those facts' incriminating implications and to assert the defense of alibi (RT 71:11–26, 72:1–6, 73:21–26, 74:1–10). To have insisted upon recalling all of the witnesses who had appeared at the preliminary hearing would have added nothing to this defense and conceivably could have been adverse to it.

Six witnesses testified at the preliminary examination. Benton Jones testified as to the burglary of the market which he managed and described the property taken (CT 11–21). Gilbert Borden testified to seeing two trucks and an automobile deposit the remnants of the stolen goods on the grounds of the gun club where he served as careaker (CT 22–34). He was unable to identify the occupants of the vehicles (CT 25). Cecelia Forcier testified that petitioner's then co-defendant rented an Avis truck on April 19, 1965 (CT 35–44). George Brown, manager of Central Rentals, testified that petitioner rented a truck at approxi-

mately 2:10 p.m., April 18 (CT 48–49). Police Officer Phillip Punchard testified to the appearance of the burglary scene and paint scrapings taken from the market's loading dock and the truck rented by petitioner (RT 73–79). Officer Donald H. Miller testified to the arrest of petitioner's co-defendant, and to the seizure and identification of various items of physical evidence (CT 81–105). Officer Miller took the stand at the subsequent superior court trial (RT 61–68).

An absolute denial of this testimony was both beyond counsel's power and unnecessary to his theory of defense. Rather than mounting a futile frontal attack, his strategy was, while admitting the substance of the preliminary hearing testimony, to create a situation in superior court wherein that testimony's indirectly incriminating aspects were fossilized within a cold record and were countered by his client's personal and, hopefully, sincere explanations from the stand. The mere fact that this tactic was unsuccessful does not imply that it was not prudent.

Respondent respectfully submits the situation and the issue presented here are identical to those which confronted the Ninth Circuit in *Wilson* v. *Gray*; 345 F.2d 282 (1965) Cert. Den. 382 U. S. 919, and that Court's analysis and conclusion should be adopted here.

> "[W]e agree that the right of an accused to cross-examine and confront prosecution witnesses in a state criminal trial is an essential ingredient of a fair trial. As such it is necessarily a right

embodied in the due process clause of the Fourteenth Amendment. Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, decided April 5, 1965; Cf. Willner v. Committee on Character, etc., 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963); see Brubaker v. Dickson, 310 F. 2d 30 (9th Cir. 1962). But we do not agree that in all cases the waiver of this right must be made by the accused personally rather than by his counsel. It has been consistently held that the accused may waive his right to cross examination and confrontation and that the waiver of this right may be accomplished by the accused's counsel as a matter of trial tactics of strategy. E. g., Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912); Cruzado v. People of Puerto Rico, 210 F.2d 789 (1st Cir. 1954); Fukunaga v. Territory of Hawaii, 33 F.2d 396 (9th Cir. 1929); United States v. Meyers, 226 F.Supp. 343 (E.D. Pa. 1964). Here, in the presence of appellee and without any objection on his part, his counsel stipulated that the matter be heard on the transcript of the preliminary hearing, each side retaining the right to produce additional evidence at the trial. The record clearly indicates that under the circumstances of the case as they existed at the time of trial, the decision of appellee's counsel to enter the stipulation was both wise and prudent, a decision deliberately made as a matter of trial tactics and strategy. We hold that under the circumstances of this case the appellee's right to cross examine and confront prosecution witnesses was effectively waived by his counsel." (*Wilson* v.

Gray, supra, pp. 286–288, footnotes omitted. See also *Symons* v. *Klinger,* 372 F.2d 47 (9th Cir. 1967) Cert. Den. 386 U.S. 1040; *Butler* v. *Wilson,* 365 F.2d 308 (9th Cir. 1966); and *Barber* v. *Page,* 381 F.2d 479 (1967 10th Cir.)).

It should be noted that the instant case is not *Brookhart* v. *Janis* (1966) 384 U. S. 1. There, under a singular Ohio procedure, counsel's waiver of cross-examination was held to be the equivalent of a plea of guilty or at best *nolo contendere,* and, as such, wholly inconsistent with the defendant's statement that in no way was he pleading guilty. Here, counsel's stipulation was completely consistent with a vigorous defense and with petitioner's plea of not guilty. (See *Symons* v. *Klinger,* 372 F.2d 47, 50 (9th Cir. 1967).)

Finally, petitioner's implied assertion that California law does not permit counsel to waive a federally protected right for tactical reasons without the express participation of his client must be countered.

The case relied upon by petitioner, *People* v. *Davis,* 48 Cal.2d 241, 309 P.2d 1, for this proposition does not deal with the question. That case involved a defense counsel who suffered a mental breakdown during trial and made a number of damaging statements during argument. When faced with the precise issue in point here, California's courts have consistently held that when defense counsel, in the defendant's presence and without objection by him agrees

to a stipulation of the type in question here, the defendant waives any subsequent objection. The most recent of these cases is *People* v. *Foster* (1967) 67 A.C. 614, 617; 63 Cal.Rptr. 288; 432 P.2d 976.

C. PETITIONER'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM WAS NOT DENIED HIM

Central to petitioner's position, but unstated throughout his petition is an assertion that he was denied his right to confront and cross-examine the witnesses against him. The record here shows that petitioner did, in fact, enjoy that right.

The Sixth Amendment, of course, guarantees the right of confrontation and this Court has held that guaranty applicable to the States through the Fourteenth Amendment (*Pointer* v. *Texas* (1965) 380 U. S. 400). Here petitioner had that right.

The Sixth Amendment states that: "In all criminal prosecutions, the accused shall enjoy . . . the right . . . to be confronted with the witnesses against him; . . ." It does not state that that confrontation, once had, must be repeated each time the testimony in question is received into evidence. *Pointer* v. *Texas*, *supra*, bears this out.

In *Pointer*, the court was concerned with the reception into evidence at trial of the transcript of the testimony of a witness taken at the preliminary examination. The defendant there had not had counsel at the preliminary, and thus was not then able effectively

to cross-examine the witness in question, and the witness was not available at time of trial. This Court held that under these circumstances, Pointer had been denied his Sixth Amendment right to confrontation. However, this Court stated:

> "[T]he case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." (*Pointer* v. *Texas, Supra,* page 407.)

The instant case is that "different one." Here petitioner was confronted with the witnesses against him at a full-fledged hearing at which he was represented by counsel who had and exercised an ample opportunity to cross-examine. All that petitioner gave up was an opportunity to confront those witnesses a second time at trial—an opportunity which his counsel for evident tactical reasons decided to forego. In such circumstances, petitioner has not been denied his right to confront the witnesses against him in any constitutional sense (*Symons* v. *Klinger*, 372 F.2d 47, 49 (9th Cir. 1967); Cert. Den. 386 U.S. 1040; *Butler* v. *Wilson*, 365 F.2d 308, 310 (9th Cir. 1966); *Barber* v. *Page*, 381 F.2d 479, 481 (10th Cir. 1967)).

CONCLUSION

Respondent respectfully submits that for the foregoing reasons, the instant petition for writ of certiorari should be denied.

Respectfully submitted,

THOMAS C. LYNCH
Attorney General
of the State of California

DORIS H. MAIER
Assistant Attorney General

EDWARD A. HINZ, JR.
Deputy Attorney General

DANIEL J. KREMER
Deputy Attorney General

Attorneys for Respondent